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FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6827

DATE COMPLAINT FILED: May 21, 2014

DATE OF NOTIFICATION: May 28, 2014

DATE OF LAST RESPONSE: June 11, 2014

DATE ACTIVATED: August 26, 2014

ELECTION CYCLE: 2014

EXPIRATION OF SOL: February 28, 2019

COMPLAINANT: John D'Aloia, Jr.

RESPONDENTS: Kent Roth for Kansas and Don Peter in his official capacity as treasurer

RELEVANT STATUTES
AND REGULATIONS: 52 U.S.C. § 30111(a)(4)¹
11 C.F.R. § 104.15

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

Kent Roth for Kansas and Don Peter in his official capacity as treasurer (the "Committee") mailed to John D'Aloia, Jr. (the "Complainant") and at least four others a letter that introduced Roth as a 2014 candidate for Kansas's 1st Congressional District and invited recipients to visit Roth's campaign Facebook page and web site. Roth's correspondence also referenced the Act's contribution limitations and prohibitions, but stated that he was not asking recipients to make a campaign contribution at that time.

Although we conclude that this activity may have violated the "sale and use" provisions of the Act,² the apparent minimal amount in violation and other factors presented

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended ("the Act"), was transferred from Title 2 of the United States Code to new Title 52 of the United States Code.

1 in this matter suggest that, consistent with its prior precedent, the Commission should exercise
2 its prosecutorial discretion and dismiss the Complaint's allegations.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. Factual Background**

5 The body of the February 28 letter that Roth sent the Complainant states:

6 Thank you for the opportunity to invite you to visit Kent Roth
7 Congressional Campaign which is my facebook page in connection with the
8 above campaign for Congress in the first District of Kansas.
9

10 I mailed my papers to the Federal Election Commission which makes
11 me a Candidate in a race to defeat Tim Huelskamp in the 2014 Republican
12 Primary Election. The maximum any one person may give per election is two
13 thousand six hundred (\$2,600) dollars. Federal law prohibits corporate,
14 national bank, union, government contractor or foreign national to contribute.
15 However, I am not asking you to make a contribution at this time, but rather to
16 take the time to get to know me.
17

18 Please visit my facebook page or web site: kentroth.com making any
19 comments or posts you desire. You are assured of my prompt reply to any
20 questions you may wish to direct to me and both you and the public will have
21 the opportunity to review my reply and be fully informed on the issues.
22 Should you prefer to send questions in writing, please find enclosed a self
23 addressed envelope for your inquiry.³
24

25 The Complainant asserts that the Committee's letter addressed him as "Captain John
26 D'Aloia, Jr." and "Captain John" — a title he does not use in his community and political
27 activities or on his checks or letterhead.⁴ But the Complainant notes that he had used that
28 formulation in a contribution to Roth's opponent, Tim Huelskamp, which Huelskamp's
29 committee disclosed to the Commission as such. The Complaint therefore alleges that the

² See 52 U.S.C. § 30111(a)(4) (formerly 2 U.S.C. § 438(a)(4)).

³ Compl., Exs. 1-5.

⁴ Compl. at 1.

1 Committee used information obtained from Huelskamp's disclosure reports to distribute the
2 February 28 letter, which it further contends solicited contributions.⁵

3 The Committee does not deny that it sent the February 28 letter to donors whose
4 names it obtained from the disclosure reports of Huelskamp's committee.⁶ Instead, it argues
5 that the Commission should take no action because the letter was an invitation to get to know
6 the candidate, not a solicitation.⁷ The Committee asserts that no contributions resulted from
7 the letter.⁸ In addition, the Committee explains that prior to the mailing, Roth had posted to
8 his campaign Facebook page and web site a press release responding to a "defamatory
9 whisper campaign" that eventually was the subject of negative "robo-calls" made to voters in
10 the District and paid for by Kansans for Hueslkamp.⁹ The Committee argues that the
11 principal purpose of the February 28 letter was to invite recipients to visit the candidate's
12 Facebook page and web site to view that response and get to know the candidate.¹⁰

13 **B. Legal Analysis**

14 Under the Act and Commission regulations, political committees are required to file
15 reports with the Commission identifying the names and mailing addresses of contributors.¹¹
16 All such reports and statements filed with the Commission are available to the public for

⁵ *Id.* The Complainant further asserts that at least four other donors to the Huelskamp campaign — Matthew Hickam, Dennis Potter, Alice Steward, and Federal Home Loan Bank of Topoka PAC — received an identical letter from the Committee also addressed exactly how their names were listed in the Huelskamp disclosure reports. *Id.* at 2.

⁶ Resp. at 1-2.

⁷ *Id.* at 1.

⁸ Resp. at 1.

⁹ *Id.* at 1-2.

¹⁰ *Id.* at 2.

¹¹ 52 U.S.C. § 30104(b)(2)(A) and (b)(3)(A) (formerly 2 U.S.C. § 434(b)(2)(A) and (b)(3)(A)); 11 C.F.R. § 104.8(a).

1 inspection and copying within 48 hours after receipt.¹² Any information copied from such
2 reports or statements, however, "may not be sold or used by any person for the purpose of
3 soliciting contributions or for commercial purposes," other than using the name and address
4 of a political committee to solicit contributions from that political committee.¹³ Under
5 Commission regulations, "soliciting contributions" includes soliciting any type of
6 contribution or donation, such as political or charitable contributions.¹⁴ Moreover, in
7 connection with the Commission's regulations concerning non-federal funds, the Commission
8 has explicitly defined "solicit" broadly to include both explicit and implicit suggestions that
9 another person make a contribution.¹⁵

10 Here, the Committee does not dispute that it copied names from Commission
11 disclosure reports; instead, it argues that the communication did not solicit contributions.
12 The February 28 letter indeed states that it is "not asking [recipients] to make a contribution at this
13 time." But the letter sets forth information about who can make contributions and in what
14 amounts and invites recipients to review the candidate's Facebook page, which in turn contained
15 several links to the candidate's donation page.¹⁶ Roth also included a self-addressed envelope
16 with the February 28 letter. Thus, despite its literal statement to the contrary, the letter
17 nonetheless may have implicitly solicited contributions from its recipients.

¹² 52 U.S.C. § 438(a)(4) (formerly 2 U.S.C. § 438(a)(4)).

¹³ *Id.*; see also 11 C.F.R. § 104.15(a).

¹⁴ 11 C.F.R. § 104.15(b).

¹⁵ *Id.* § 300.2(m); see *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)).

¹⁶ See <http://www.facebook.com/kentrothesquire> (last visited Oct. 16, 2014) (providing links to campaign donation pages in Facebook posts dated December 5 and 7, 2013, and January 4, 11, and 15, 2014).

Moreover, even if the February 28 letter were not considered a solicitation, Roth may nonetheless have impermissibly used Commission contributor data. In Advisory Opinion 2003-24 (NCTFK), the Commission concluded that the requestor would violate the provision if it used contributor data to send a communication directing contributors to websites through which they would be able to send messages to elected officials.¹⁷ If NCTFK's proposed communications containing no solicitations, even implicitly, would violate the "sale and use" provision, then Roth's letter directing potential contributors to his website using Commission contribution data may have violated the Act as well.¹⁸

Nonetheless, we conclude that the scope of the potential violation here and the present status of the Committee do not warrant further enforcement proceedings. The Committee spent \$735 on "stamps" on February 26, 2014, possibly the amount spent to send the letter at issue.¹⁹ Further, the Commission's records reflect that no contributors identified in the Hueskamp disclosure reports contributed to the Committee, suggesting the February 28 letter did not in fact generate any contributions. Finally, Roth withdrew from the race on May 23, 2014,²⁰ more than two months before the August 5, 2014, election, while the Committee reports no cash on hand or outstanding debts and filed a Termination Report on June 16,

¹⁷ The Commission characterized the sale and use provision as "a broad prophylactic measure intended to protect the privacy of the contributors about whom information is disclosed" in reports and statements filed with the Commission. Advisory Op. 2003-24 (NCTFK). See generally *FEC v. Legi-Tech, Inc.*, 967 F. Supp. 523 (D.D.C. 1997) (discussing the scope and purpose of the sale and use prohibition).

¹⁸ We note that the Commission has permitted a candidate to use information obtained from disclosure reports to mail letters to an opponent's contributors to correct allegedly defamatory statements of the opponent. See Advisory Op. 1981-05 (Findley). Although in connection with this proceeding the Committee asserts that a principal purpose of the February 28 letter was to respond to a defamatory "whisper campaign" through the candidate's Facebook page and campaign web site, nothing in the text of the letter directly addresses the allegedly defamatory remarks. The facts here are thus materially distinguishable from those in Advisory Op. 1981-05.

¹⁹ See 2014 April Quarterly Report at 19 (Apr. 13, 2014).

²⁰ See <http://www.facebook.com/kentrothesquire>.

1 2014, after being in existence for approximately five months.²¹ Under these circumstances,
2 and consistent with the Commission's approach in prior "sale and use" matters involving
3 allegations of similar scope,²² we recommend that the Commission exercise its prosecutorial
4 discretion and dismiss the allegation that Kent Roth for Kansas and Don Peter in his official
5 capacity as treasurer violated 52 U.S.C. § 30111(a)(4) (formerly 2 U.S.C. § 438(a)(4)), and
6 close the file.²³

7 **III. RECOMMENDATIONS**

- 8 1. Dismiss the allegation that Kent Roth for Kansas and Don Peter in his official
9 capacity as treasurer violated 52 U.S.C. § 30111(a)(4) (formerly 2 U.S.C.
10 § 438(a)(4));
11
12 2. Approve the Attached Factual and Legal Analysis
13
14 3. Approve the appropriate letters; and
15

²¹ The request to terminate was denied on July 10, 2014, because of the existence of this enforcement matter.


²² See, e.g., MUR 5990 (Citizens for Matt Shaner) (Commission dismissed with caution apparent violation of sale and use provisions where respondent spent \$1,811 to send 984 solicitations and received no resulting contributions). We do not recommend sending a letter of caution here given the lack of any current candidate and the Committee's desire to terminate.


²³ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (in determining whether to pursue an enforcement action, an agency "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another . . .").

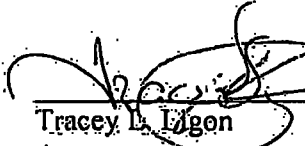
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4. Close the file.

10-29-14
Date


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